SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1969

WILLIAM WINKLE,

Petitioner

V.

STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 506 SW 2d 891 (Tex. Crim. App. 1974), and is reproduced in Petitioner's Petition.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the petition although Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner advances two questions which Respondent believes do not represent the real issue. The following question is submitted by Respondent:

1. Were Petitioner's Fourth Amendment rights violated requiring reversal when the state court admitted into evidence two knives tht had been used in the commission of the crime of rape and which were seized during a reasonable search pursuant to a search warrant issued upon probable cause authorizing seizure of the implements of the rape?

STATEMENT OF THE CASE

Petitioner was indicted (R. 4) in two cases of rape. The jury found Petitioner guilty and set punishment at life (R.44-47, 52). After sentencing, Petitioner gave notice of appeal. The Texas Court of Criminal Appeals affirmed Petitioner's convictions (Appendix "A" to Petitioner's Petition).

Evidence at the trial on the merits shows that on March 18, 1972, at approximately 10:00 or 10:30 P.M. the two 18 year old prosecutrixes were driving to a miniature golf course in Dallas, Texas, (R.64, 65, 150-152). Petitioner and two other males drove their car alongside and motioned for the girls to stop, which they did. Petitioner and the two other males were unknown to the girls. After a brief conversation the girls were asked to go to a party. (R.66-68, 152-154). One of the males then left in his car to pick up his date, leaving Petitioner and the other male with the girls.

The girls were directed by Petitioner and his male companion and drove them to a house in Dallas where the girls were invited inside.(R.69, 155). When the group entered the house, they listened to music and played with some puppies. (R.70, 71, 155, 156). Shortly thereafter, the other male who had previously departed to pick up his date, arrived at the house with his date, changed his shirt, and advised the others that he and his date were not staying and departed. (R.71, 72, 156).

The girls also decided to leave and attempted to do so when they discovered their car would not start. (R.72, 157). Petitioner and his male companion indicated they could fix it, and the car was pushed around into the garage where they said they had their tools and some light (R.73, 74, 158). They were unable to start the car, and they all returned to the house (R.159). Upon returning to the house one of the girls attempted to call a mechanic friend, but the phone did not work (R. 75, 159, 160).

After some conversation as to what to do about the car, Petitioner and his companion each pulled out knives that appeared to be butcher of kitchen knives and ordered the girls into one of the bedrooms in the house (R.77, 78, 160). The girls were frightened, and Petitioner and his companion ordered both girls to undress and ordered one to lay on the bed and the other to lay on the floor (R.82, 161, 163). They were still holding the knives on the girls and threatened to kill them if they did not comply (R.81, 162). The girls were frightened and complied.

Over the next several hours, Petitioner and his companion had intercourse several times with each of the girls (R.83, 163), committed rectal sodomy (R.86, 87), forced the girls to commit oral sodomy on them (R. 86, 166, 168), and forced the girls to commit oral sodomy on each other (R. 86-89, 168).

The girls pleaded to leave and said they would not tell anyone if they let them go. Petitioner said he could not believe them and that they might have to be killed (R. 92, 93, 169, 170). About that time the third male who previously departed with his date, returned to the house (R. 94, 171). Petitioner and his companion put the knives in the top dresser drawer in the bedroom (R. 94, 95). One of the girls talked to this third male that arrived and related to him what had happened (R. 95, 171). The girls car was fixed and they were told to leave (R. 96, 97, 172).

The girls left and went to one of their houses, arriving about 5:00 A.M. (R. 173). That morning about 8:30 A.M., they related to the girl's mother that they had been raped (R. 97, 98, 173), and the police were called. The girls directed the police to the house where the assualts occurred. When the police arrived at the house, Petitioner and the other two males were there (R. 174, 229). The police were invited in the house and Petitioner was taken into custody (R. 232-235).

Officer Cranford of the Dallas police interviewed the girls, and learned that the knives used by Peitioner and his companion were put in a dresser drawer in the bedroom where the assaults took place (R. 143). Based on the information received, officer Cranford on March 20th submitted his affidavit for search warrant to Judge Cole and obtained a search warrant (R. 245, 476, 477).

Within 30 minutes after obtaining the search warrant, officer Cranford personally went to the place described in the warrant, being the same place where the offenses occurred, looked for the knives in the exact place described by the girls and the place contained in his affidavit, and found two knives there (R. 249, 271). The dresser in the bedroom was the only place searched, and there was no search of any other part of the house (R. 272). The two knives were the only items taken by officer Cranford and no general or exploratory search was conducted.

During the trial, each of the girls testified and, without objection, testified that the two knives obtained from the house by Officer Cranford appeared to be the same knives used by Petitioner and his companion during the assaults (R. 79, 161). The knives were later admitted into evidence over Petitioner's objection (R. 271).

Both girls identified Peitioner as being one of the males that committed the offenses against them (R. 85, 165).

ARGUMENT and AUTHORITIES

Officer Cranford interviewed the two girls and was told of the offenses committed. He was also advised as to where the offenses took place and the fact the culprits used knives in the commission of the offenses and that the knives were last seen in the dresser drawer in the bedroom where the offenses occurred.

Armed with this information, Officer Cranford proceeded to a magistrate to secure a search warrant to search for the two knives. His affidavit to the magistrate (R. 476) set forth probable cause and specifically describe the house and the place therein to be searched and described the things to be seized as knives placed in a dresser drawer in the front bedroom on the west side of the house.

This affidavit furnished probable cause and specificity for the magistrate to issue a search warrant

and Petitioner does not question this in this petition. The magistrate did issue a search warrant for the specific address and directed a search for implements, such as above named, of the commission of the offense of rape. Although the implements (such as above named) were not described as "knives" in the warrant itself, they were described as such in the affidavit and "such as above named" would have reference to that affidavit.

Officer Cranford, who made the affidavit, executed the warrant at the address named. He was personally aware that a specific place was to be searched (dresser drawer in front bedroom), and was aware that specific items were to be seized (knives).

Officer Cranford executed this warrant within thirty minutes after it was issued. He went to the specific address and searched only the dresser drawer in the specific bedroom and recovered two knives as described. No other place and no other part of the house was searched. This was not a general or exploratory search, but was a specific search for specific items and authorized by the warrant.

The only attack Petitioner makes to this search is that the warrant itself did not include the words "knives" when it was describing the items to be seized, although a neutral magistrate had considered the affidavit which established probable cause to search for knives in the dresser drawer, and issued a warrant for that purpose. This is not a situation where other premises were searched or items other than the ones

intended to be seized were seized, but is a situation where a specific search was conducted to seize specific items pursuant to a warrant from a neutral magistrate based upon probable cause.

To sustain Petitioner's contention would mean the subject search would be declared illegal because the warrant did not describe the items to be seized as knives although they were described to the magistrate in the officer's affidavit as knives. To so hold would establish a hyper-technical constitutional rule for warrants and would tend to cause law enforcement personnel to not seek warrants when our constitutional policy has always been to encourage warrants.

In furtherance of the constitutional policy of encouraging search warrants this court has in doubtful or marginal cases sustained a search under a warrant where without a warrant the search would fall. As stated by the Court in *U. S. v. Ventresca,* 380 U. S. 102 (1965), at page 108:

> "Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

See *Harris v. U. S.,* 331 U. S. 145 (1947).

The "Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract . . . Technical requirements of elaborate

specificity . . . have no place in this area." *U. S. v. Nolan*, 413 F.2d 850 (6th Cir. 1969) at page 854.

Our courts have consistently rejected such highly technical all or nothing approaches to search warrants as Petitioner suggests. To properly resolve this question, it should be remembered that the Fourth Amendment only condemns unreasonable searches, and what is a reasonable search cannot be determined by any fixed formula, but must be determined from all the facts and circumstances of each case. Even in warrant searches where the place to be searched or the things to be seized are perhaps not fully described, the courts have not hesitated to go beyond technical warrant requirements and uphold the search if otherwise reasonable. *U. S. v. Rabinowitz*, 339 U. S. 56 (1950); *Ludwig v. Wainwright*, 434 F.2d 1104 (5th Cir. 1970); *Gurleski v. U. S.*, 405 F.2d 253 (5th Cir. 1968); *U. S. v. Alloway*, 397 F. 2d 105 (6th Cir. 1968).

The courts have considered a general description of "instrumentalities" of the particular crime to be a sufficient constitutional description to seize items constituting instruments of the crime, although there was no specific description of the items. *Harried v. U. S.* 389 F.2d 281 (D. C. Cir. 1967); *U. S. v. Robinson*, 287 F. Supp. 245 (N. D. Ind. 1968). A pair of shoes were found to be "instruments of the crime" even though not specifically described in the warrant. *U. S. v. Guido*, 251 F.2d 1 (7th Cir. 1958).

Respondent submits that the "implements" description in the warrant under attack sufficiently described the times to constitutionally authorize the seizure of the two knives. The knives were instruments of the crime, were lawfully seized, and were admissible in evidence.

The courts have also held that items not described even in a general way in the warrant may nevertheless be seized under such warrants if the items constitute fruits, instrumentalities or evidence of a crime. *Maryland Penitentiary v. Hayden*, 387 U. S. 294 (1967); *Harris v. U. S.*, 331 U. S. 145 (1947); *Johnson v. U. S.*, 293 F.2d 539 (D. C. Cir. 1961), cert. denied 375 U. S. 888; *Ludwig v. Wainwright*, supra; *U. S. v. Nolan*, 416 F.2d 588 (10th Cir. 1969); *U. S. v. Munroe*, 421 F. 2d 644 (5th Cir. 1970) cert. denied 400 U.S. 851; *U. S. v. Tranquillo*, 330 F. Supp. 871, (M. D. Fla. 1971).

Being instruments of the crime of rape, the knives were also properly seized and admissible even if they had not been described in the warrant even in a general way.

In determining the constitutionality and reasonableness of a search pursuant to a warrant, the courts have also considered matters outside the specific wording of the warrant itself. Courts have considered such things as the information contained in the affidavit on which the warrant is based, the information available to the officer executing the

warrant, the good faith of the officer executing the warrant, and the manner in which the warrant was actually executed and the seizure made. See for examples *U. S. v. Melancon*, 462 F. 2d 82 (5th Cir. 1972); *U. S. v. DePugh*, 452 F. 2d 915 (10th Cir. 1971); Hamilton v. U. S., 433 F. 2d 526 (D.C. Cir. 1970), cert. denied 400 U.S. 944; *U. S. v. Hassell*, 427 F. 2d 548 (6th Cir. 1970); *U. S. v. Munroe*, 421 F. 2d 644 (5th Cir. 1970), cert. denied 400 U. S. 851; *Harried v. U. S.*, 389 F. 2d 281 (D. C. Cir. 1967); *U. S. v. Gomez*, 42 FRD 347 (1967); *Kenny v. U. S.*, 157 F. 2d 442 (D. C. 1946); *Vinto Products Co. v. Goddard*, 43 F. 2d 399 (D. C. Minn. 1930); *U. S. v. Curwood*, 338 F. Supp. 1104 (D. Mass. 1972); *U. S. v. Tranquillo*, 330 F. Supp. 871 (M. D. Fla. 1971).

When reviewing all of the facts and circumstances surrounding this search and seizure, it should be concluded that the search was not an unreasonable search and that the seizure and admission into evidence of the two knives did not violate Petitioner's constitutional rights under the Fourth or Fourteenth Amendments to the United States Constitution.

The affidavit of Officer Cranford established probable cause and specifically described the place within the house to be searched. The affidavit also specifically named the items to be seized as "knives". Pursuant to that affidavit, a neutral magistrate issued

a search warrant to search the premises described in the affidavit and to seize implements kept for the purpose of aiding in the commission of the offense of rape, such implements, having been described in the officer's affidavit as "knives".

Armed with the warrant, Officer Cranford, within thirty minutes, went to the premises and made a search of the dresser drawer in the bedroom named in the affidavit and found and seized two knives. The officer searched only that place and made no general or exploratory search. The knives were "implements" of the crime of rape, and the description in the warrant was sufficient to authorize the seizure of the knives as "implements" of the crime.

Further, under all the circumstances, including the warrant, the affidavit by the officer, the limited nature of the search and the information available to the officer at the time of the search, it follows that the search and seizure of the knives was pursuant to a valid search warrant, was made in good faith by the officer, was a reasonable search and seizure, and did not unconstitutionally invade Petitioner's privacy.

Regarding invasion of privacy, Petitioner was not present at the time of the search and although he was present on the premises previously when he was arrested, Respondent submits that Petitioner has failed to demonstrate sufficient standing to even question the search of the premises or the seizure of the knives.

Respondent further suggests that had this search been conducted by the officer at the time of Petitioner's arrest that the officer could have constitutionally seized the knives without a warrant as incident to Petitioner's lawful arrest. Assuming the seizure would have been proper incident to Petitioner's lawful arrest, the subsequent search and seizure pursuant to a search warrant should not be found unconstitutional because of an alleged lack of specific description of the items to be seized. *U. S. v. Rabinowitz,* 339 U. S. 56 (1950); *Harris v. U. S.* 331 U. S. 145 (1947); *U. S. v. Robinson,* 287 F. Supp. 245 (N. D. Ind. 1968); *U. S. v. Beigel,* 254 F. Supp. 923 (S. D. N.Y. 1966), aff'd 370 F.2d 751, cert. denied. 387 U. S. 930.

The warrant was valid, and the surrounding circumstances show a reasonable search pursuant to a warrant based upon probable cause and issued by a neutral magistrate. The constitutional requirements were satisfied and the search and the seizure were constitutionally permissible.

Petitioner has shown no error or constitutional dimensions that would call for reversal of his rape conviction.

CONCLUSION

For the reasons above stated, Respondent says there was no denial of Petitioner's constitutional rights. The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the _____ day of August, 1974, I mailed copies of Respondent's Brief in Opposition to: Mr. Malcolm Dade, Attorney at Law, 1620 Fidelity Union Tower, Dallas, Texas 75201.

GILBERT J. PENA
Assistant Attorney General

(date)